

the sins of the father, neither can we credit the son for the courage of the father. As Supreme Court Justice, would you have the courage to stand up for civil rights even if it is unpopular?

We want to understand what you meant in 1985 when you said from the heart that you disagreed with the Warren Court on reapportionment, the one man/one vote principle. That was a civil rights decision. We want you to explain your membership in an organization that you highlighted at Princeton University that tried to challenge the admission of women and minorities. And I think we want to make certain of one thing. We want to make certain that every American who stood in silent tribute to Rosa Parks hopes that you will break your silence and speak out clearly for the civil rights that define our unity as a Nation.

There have been many controversial cases alluded to here. Some people have questioned, What is the difference? What difference in my life does it make if Sam Alito is on the bench or if he isn't? Why would I care if it is a narrow interpretation or a broad interpretation of the law? How does it affect my life? We know it affects everyone's life. We were reminded just very recently with the tragedy that was in the headlines. In one of your dissents, you would have allowed a Pennsylvania coal mine to escape worker safety and health requirements required by Federal law. Last week's tragedy at the Sago mine reminds us that such a decision could have life and death consequences.

Judge Alito, millions of Americans are concerned about your nomination. They are worried that you would be a judicial activist who would restrict our rights and freedoms. During your hearing, you will have a chance to respond, and I hope you do. More than any recent nominee, your speeches, your writings, your judicial opinions make it clear that you have the burden to prove to the American people that you would not come to the Supreme Court with any political agenda. Clear and candid answers are all that we ask.

I sincerely hope you can convince the U.S. Senate and the American people that you will be a fifth vote on the Supreme Court that the American people can trust to protect our most basic important freedoms and preserve our time-honored values.

Thank you very much.

Chairman SPECTER. Thank you, Senator Durbin.

Senator Brownback?

**STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR
FROM THE STATE OF KANSAS**

Senator BROWNBACK. Thank you, Mr. Chairman.

Welcome, Judge Alito, your wife and family. Delighted to have you here. You only have two more pitchers, and then you get a bat. So I am sure people will be happy to hear from you.

Mr. Chairman, before I go forward with my statement, I would like to enter into the record a summary of four cases that Judge Alito has ruled on where he backed employees claiming racial discrimination. It has been entered a couple of times here that he has not ruled in favor of people claiming racial discrimination, and I have a summary of four cases where he has, and I want to enter that into the record.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator BROWNBACK. Judge Alito, I welcome you to the hearing. This is an extraordinary process. It is a fabulous process and a chance for a discussion with you, with the American public, about the role of the judiciary in our society today. It has become an ever-expanding and important discussion because of the expanding role of the courts in recent years in American society. When the courts, improperly, I believe, assume the power to decide more political than legal issues in nature, the people naturally focus less on the law and more on the lawyers that are chosen really to administer the law. Most Americans want judges who will stick to interpreting the law rather than making it. It is beyond dispute that the Constitution and its Framers intended this to be the role of judges.

For instance, although he was perhaps the leading advocate for expansive Federal power, you can look at Founding Father Alexander Hamilton, nevertheless assuring—assuring—the countrymen in Federalist 78 that the role of the Federal courts under the proposed Constitution would be limited. He said, “The courts must declare the sense of the law, and if they should be disposed to exercise will instead of judgment, the consequences would equally be the substitution of their pleasure to that of the legislative body.”

It seems like we are back at an old debate—the role of the courts—and I believe you and others would look and say that the role of the courts is limited, and it is not to decide political matters.

Chief Justice Marshall later explained in *Marbury v. Madison* that the Constitution permitted Federal courts neither to write nor execute the laws but, rather, to say what the law is. That narrow scope of judicial power was the reason the people accepted the idea that the Federal courts could have the power of judicial review. That is the ability to decide whether a challenged law comports with the Constitution.

The people believed that while the courts would be independent, they would defer to the political branches on policy issues. This is the most foundational and fundamental of issues. And yet we are back in discussing it because of the role of the judiciary expanding in this society today.

It may seem ironic, but the judicial branch preserves its legitimacy through refraining from action on political questions. That concept was put forward best by Justice Frankfurter, appointed by President Roosevelt. He said, “Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed and, therefore, most dependable within narrow limits.”

Now, I want to take on this point of the reservation of certain seats on the bench for certain philosophies, which it seems as if we have heard a great deal about today that you need to be like Sandra Day O'Connor in judicial philosophy to be able to go on her seat on the bench. Some interest groups have put forward that philosophy and argued that you deserve closer scrutiny because you don't appear to have the same philosophy, or even opposition if it is not determined that you do not have the same judicial philosophy. This testimony suggests that that would change the ideological balance, that you would change that ideological balance, there-

fore, you should not be approved. And I say that that notion is not anywhere in the understanding of the role of the judges. It creates a double standard for your approval and looks conveniently—it looks suspiciously convenient for the opposition to put forward.

Seats on the bench are not reserved for causes or interests. They are given to those who will uphold the rule of law so long as the nominee is well qualified to interpret and apply the law. This has long been the case of the Supreme Court. And I want to note here that historically the makeup of the Court has changed just as elected branches have changed. In fact, nearly half of the Justices, 46 of 109, who have served on the Supreme Court replaced Justices appointed by a different political party. In recent years, even as the Court has become an increasingly political body, the Senate is not focused on preserving any perceived ideological balance when Democrat Presidents have appointed people to the Court. And the best example of that is the Senate rejecting that notion when Ruth Bader Ginsburg came in front of the Senate and was approved 96–3 to be on the Supreme Court to replace conservative Justice Byron White. This was in 1993.

Now, Justice Ginsburg, it was noted earlier, was the general counsel for the ACLU, certainly a liberal group. It was abundantly clear during the confirmation hearing that Ginsburg would swing the balance of the Court to the left. But because President Clinton won the election and because Justice Ginsburg clearly had the intellectual ability and integrity to serve on the Court, she was confirmed.

During her hearing, hardly any mention was made about balance with Justice White. The only discussion that occurred about Justice White was when Senator Kohl, our colleague, asked her what she thought of Justice White's career. And she started off by saying that she was not an athlete.

History has shown that she did, in fact, dramatically change the balance of the Court in many critical areas, such as abortion, the privacy debate expansion, and child pornography. And I have behind me three of the key cases where Justice White ruled one way, even wrote the majority opinion, and Justice Ginsburg ruled the other way with the majority. You talk about a swing of balance, and yet the issue was not even raised at Justice Ginsburg's confirmation hearing, and yet now it seems as if that is the paramount issue—not only the paramount issue, it actually makes you have to go to a higher standard to be approved. And that is just simply not the way we have operated in the past, nor is it the way we should operate now.

As I stated at Justice Roberts's hearing, the Court has injected itself into many of the political debates of our day, and as my colleague Senator Cornyn has mentioned, the Court has injected itself in the definition of marriage, deciding whether or not human life is worth protecting, permitting Government to transfer private property from one person to another, even interpreting the Constitution on the basis of foreign and international laws.

The Supreme Court has also issued and never reversed a number of decisions that are repugnant to the Constitution's vision of human dignity and equality. Although cases like *Brown v. Board of Education* in my State are famous for correcting constitutional

and court errors, there remain several other instances in which the Court strayed and stayed beyond the Constitution and the laws of the United States. Among the most famous of these Supreme Court cases of exercise of political power, I believe, are the cases of *Roe v. Wade* and *Doe v. Bolton*, two 1973 cases based on false statements which created a constitutional right to abortion. And you can claim whatever you want to of being pro-life or pro-choice, but the right to abortion is not in the Constitution. The Court created it. It created a constitutional right. And these decisions removed a fully appropriate political judgment from the people of several States and has led to many adverse consequences.

For instance, it has led to the almost complete killing of a whole class of people in America. As I noted to my colleagues in the Roberts hearings, this year—this year—between 80 to 90 percent of the children in America diagnosed with Down syndrome will be killed in the womb simply because they have a positive genetic test—which can be wrong and is often wrong, but they would have a positive genetic test for Down syndrome and they will be killed.

America is poorer because of such a policy. We are at our best when we help the weakest. The weak make us strong. To kill them makes us all the poorer, insensitive, calloused, and jaded. *Roe* has made it not only possible but has found it constitutional to kill a whole class of people simply because of their genetic makeup. This is the effect of *Roe*.

I think this is a proper issue for us to consider, and the judge you are replacing noted one time “that the Court’s unworkable scheme for constitutionalizing abortion has had this institutionally debilitating effect should not be surprising since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe*.”

You will have many issues in front of you, many that we will not discuss here in front of this committee. I think it unfortunate that we only narrow in on so few of the cases that you are likely to hear in front of you. And yet that is the nature of the day because they are the hot, political, heat-seeking cases. You are undoubtedly qualified. You are cited by the ABA to be unanimously well qualified. I look forward to a thorough discussion and a hopeful approval of you to be able to join the Supreme Court of the United States.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Brownback.

We now move to the final opening statement. When we finish the statement of Senator Coburn, we are going to go right to the presenters, Senator Lautenberg and Governor Whitman. So I would like them to be on notice that we will be doing that in just a few moments, and following Senator Lautenberg and Governor Whitman, we will be hearing from Judge Alito.

Senator Coburn, the floor is yours.

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM
THE STATE OF OKLAHOMA**

Senator COBURN. Thank you. Judge Alito, welcome. I know you are tired of this, and I will try to be as brief as possible.